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NEW JERSEY BOARD OF
CHIROPRACTIC EXAMINERS *ml*

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF CHIROPRACTIC EXAMINERS
OAL DOCKET NO. BDSCE13047-95N

IN THE MATTER OF THE :
SUSPENSION OR REVOCATION :
OF THE LICENSE OF :
:
PHILIP M. POTACCO, D.C. :
LICENSE NO. MC01657 :
:
TO PRACTICE CHIROPRACTIC IN :
THE STATE OF NEW JERSEY :

Administrative Action

FINAL ORDER

This matter was opened to the New Jersey State Board of Chiropractic Examiners (hereinafter "Board") by way of complaint by then Attorney General Deborah T. Poritz (August T. Lembo, Deputy Attorney General, appearing) for an Order suspending or revoking Respondent's license to practice chiropractic in the State of New Jersey.

The formal administrative complaint, filed on July 26, 1995, alleged that Respondent engaged in the use of fraud, deception, misrepresentation, gross or repeated acts of negligence, malpractice and incompetence and professional misconduct. The Attorney General was permitted to amend the prehearing memorandum in the matter to also allege violation of the Board's record-keeping rule. Specifically, the complaint alleged in the first count, that Respondent treated a thirteen-year-old female patient, D.W., who had been injured in an automobile accident, 383 times over the course of a three year period

from 1990 to 1993 for a total billing of \$27,020 and that such treatments were not substantiated by the patient's problems and were therefore excessive. Count I also alleged that the patient was sent for a magnetic resonance imaging examination ("MRI") on October 26, 1992, more than 21 months after treatment had commenced, and that the MRI resulted in a diagnosis of Scheuermann's disease.

The second and third counts of the complaint alleged that Respondent treated a two year old female patient, her six year old brother and their mother, J.C., M.C. and R.C. respectively, for injuries sustained in an automobile accident which occurred on June 15, 1991. The complaint charged that Respondent made discharge diagnoses of permanent injuries not substantiated by the final examinations, failed to make appropriate referrals, charged excessive fees and provided excessive treatment not substantiated by the patients' problems.

Finally, the complaint alleged that there had been a prior order entered by the Board of Medical Examiners such that there existed grounds for heightened sanctions pursuant to N.J.S.A. 45:1-25.

An answer was filed by Bennett Wasserstrum, Esq., of the law firm of Wasserstrum and Fabiano, on behalf of Respondent, on or about September 15, 1995. The case was transmitted to the Office of Administrative Law on or about November 2, 1995 for hearing. The matter was assigned to the Honorable Edith Klinger, A.L.J. and was scheduled for trial on October 24, 25, 28 and 29. Discovery proceeded prior to hearing. Following a telephone conference on October 9, 1996, Judge Klinger permitted an amendment to the pretrial order to add allegations that Respondent provided to the Board, during its investigation of Respondent's chiropractic practice, a set of records different from the

patient records previously submitted to the insurer of the patient D.W., and that this violated N.J.S.A. 45:1-21(b) through (e) and N.J.A.C. 13:44E-2.2 and therefore N.J.S.A. 45:1-21(h).

On October 24, 1996, the date on which the hearing was scheduled to begin, the Attorney General and Respondent further engaged in settlement discussions which resulted in a tentative agreement which was entered on the record before Judge Klinger and which was made subject to approval by the Board at its next scheduled meeting on November 21, 1996. At its meeting on November 21, 1996, the Board approved the entry of the within consent order.

Upon review of all of all the materials, information and testimony presented, the Board finds that Respondent engaged in misrepresentation and professional misconduct and in violation of the Board's rule, N.J.A.C. 13:44E-2.2, which sets standards for keeping patient records. Such conduct on the part of Respondent is contrary to the provisions of N.J.S.A. 45:1-21(b), (e) and (h). Specifically, the Board finds the following:

1. Respondent treated the patients R.C., M.C., and J.C., in the same manner continually for an excessive number of times, including approximately 170 visits each for R.C., M.C. and J.C. from in or about July 1991 to August 1992, without any significant changes in the nature of the services provided. Total charges for these services was in excess of thirty seven thousand (\$37,000) dollars.

2. Respondent failed to refer these patients for evaluation by other health care providers or for appropriate testing when, as he stated, there was no significant improvement in their conditions.

3. Respondent failed to keep adequate records to document the observations made by him and by the patients and failed to keep adequate records of the results of the evaluations and objective tests performed by him, or failed to perform the procedures necessary to obtain those objective test results.

4. Respondent failed to document advice to the patients M.C. and J.C. as to the restrictions on their physical activity.

5. Respondent committed similar violations in the treatment of patient, D.W. The Board also finds that Respondent submitted records to the Board during its investigation which differed from those submitted to the insurer of D.W.

As mitigating factors, the Board is advised by Respondent that the incidents reflected in these two patient cases are substantially isolated and that Respondent handled very few motor vehicle accident cases other than these, in the last several years. The Board is also advised that Respondent and his spouse are limited in their family holdings to liquid assets of approximately twenty five thousand (\$25,000) dollars, ownership of two motor vehicles and ownership of the family domicile. The penalties set forth in this order are made specifically contingent upon the accuracy of these representations and upon the accuracy of an affidavit to be executed by Respondent confirming these representations. Any finding by the Board by a preponderance of the evidence, after affording the Respondent the opportunity to a hearing, that these representations are not true shall constitute grounds for the board to amend this order to impose full revocation of Respondent's license and other additional penalties.

The Board finds that to permit Respondent to continue to practice chiropractic without imposing a penalty and a period of suspension would be inconsistent with the protection of the public health, safety and welfare.

The parties being desirous of resolving this matter without the necessity of further formal proceedings, and it appearing that Respondent, Philip M. Potacco, D.C., acknowledges the findings of the Board previously set forth as constituting grounds for disciplinary action pursuant to N.J.S.A. 45:1-21(b), (e) and (g), and it further appearing that Respondent has read the terms of this order, understands their meaning, and consents to be bound by same, and it further appearing that the Board finds that the within order is adequately protective of the public interest and it further appearing that good cause exists for the entry of the within order:

IT IS THEREFORE on this ^{APRIL} 30th day of ~~December~~ 1997,
ORDERED that:

1. Respondent's license to practice chiropractic be and hereby is suspended for five years commencing on December 1, 1996, (the date on which Respondent voluntarily ceased to practice), the first three years to be served as a period of active suspension and the remainder to be stayed and served as a period of probation under such conditions as the Board may impose.

2. At the conclusion of the active suspension period, Respondent may apply for reinstatement of his license. Such application shall be in writing and Respondent shall have the burden to demonstrate that the

Respondent is fit and competent to practice chiropractic. This shall include evidence that Respondent has: (a) fulfilled all requirements of this order including but not limited to full payment of the penalties, costs and restitution imposed by this order on or before the dates due; (b) completed a refresher course or courses in the practice of chiropractic, the course or courses to be subject to the Board's approval; (c) undergone a medical and psychological evaluation to determine that Respondent is fit to practice chiropractic, the health care practitioner performing this evaluation to be one approved by the Board; (d) full and immediate disclosure to the Board of Respondent's patient records for the period prior to the suspension imposed herein, and the payment of further restitution as a condition of reinstatement, provided the Board finds, by a preponderance of the evidence, that such additional restitution is justified; and (e) such other conditions as the Board may reasonably determine. No additional restitution shall be required in connection with services rendered to the patients who are the subject of the administrative complaint herein, except as otherwise provided in this order. For purposes of compliance with subsection (d) of this order, Respondent shall maintain true and complete copies, which he shall be capable of certifying as such, of all his patient records as of October 9, 1996, including all records for which patient services were no longer being provided. It shall be Respondent's burden to maintain these records and to show that he has taken all reasonable steps to protect the records from any loss. All reasonable costs of review of these records shall be paid by Respondent.

3. Respondent shall pay a monetary penalty to the Board of Chiropractic Examiners in the amount of seven thousand (\$7,000) dollars

by certified check or money order contemporaneous with the entry of this order, provided, however, that Respondent may elect to pay the monetary penalty in installments as provided herein.

4. Respondent shall pay costs to the Board of Chiropractic Examiners in the amount of two thousand (\$2,000.00) dollars by certified check or money order, contemporaneous with the entry of this order, provided, however, that Respondent may elect to pay the costs in installments as provided herein.

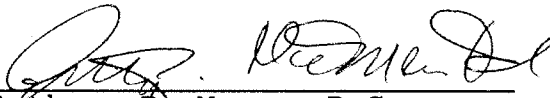
5. Respondent shall pay restitution by certified check or money order in the amount of three thousand (\$3,000) dollars to the Travelers Insurance Company, contemporaneous with the entry of this order, provided, however, that Respondent may elect to pay the restitution in installments as provided herein.

6. Respondent shall pay restitution by certified check or money order in the amount of three thousand (\$3,000) dollars to the Selective Insurance Company contemporaneous with the entry of this order, provided, however, that Respondent may elect to pay this restitution in installments as provided herein.

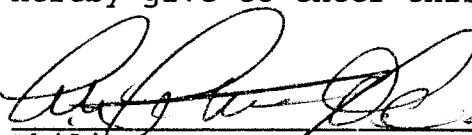
7. Respondent may elect to pay the monetary penalty, costs and restitution required by paragraphs three through six of this order in monthly installments, commencing on or before February 1, 1997. With respect to monetary penalties and costs, there shall be eighteen monthly installments of five hundred (\$500.00) dollars each, payable on or before the first day of each month by certified check or money order to the Board. The full amount shall be paid no later than July 1, 1998. With respect to the restitution provided for in paragraphs five and six, there shall be in eighteen monthly installments of one hundred sixty-six

(\$166.66) dollars to be payable each month to the Travelers Insurance Company and the same amount to the Selective Insurance Company, to addressees as the Board shall designate, payable on or before the first day of each month by certified check or money order with a copy of the checks or money orders and any accompanying correspondence to be sent to the Board. The full amounts shall be paid no later than July 1, 1998. Any failure to make any payment of monetary penalty, costs or restitution on the date due (including the dishonoring of any payment check) shall constitute a violation of this order and shall also result in the balance of the full amount of all monetary penalties, costs and restitution becoming due and payable immediately.


BOARD OF CHIROPRACTIC EXAMINERS

By: 
Anthony De Marco, D.C.
President

I have read the within Order.
I understand the Order, and I
agree to be bound by its terms
and conditions. Consent is
hereby give to enter this Order.


Philip M. Potocco, D.C.

This Order is consented to
as to form and entry.


Bennett Wasserstrum, Esq.